

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HENRY R. TERRY,

Pro Se Plaintiff,

- against -

WAYNE CARAVELLO and MARK JURLANDO,

Defendants.
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**REPORT AND
RECOMMENDATION**

CV 09-3173 (SJF) (AKT)

A. KATHLEEN TOMLINSON, Magistrate Judge:

I. PRELIMINARY STATEMENT

Plaintiff Henry R. Terry (“Plaintiff”), appearing *pro se*, commenced this action against Defendants Wayne Caravello and Mark Jurlando (together, “Defendants”) to vacate an award issued by the American Arbitration Association (“AAA”) on April 27, 2009 in favor of Defendants (the “Arbitration Award”) in the arbitration entitled *Henry R. Terry v. Wayne Caravello and Mark Jurlando*. See Motion to Vacate Arb. Award (“Compl.”) [DE 1]. Plaintiff filed this action pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the “FAA”), alleging, *inter alia*, that the Arbitration Award should be vacated on the grounds set forth in the FAA, 9 U.S.C. § 10, including that (1) the Award is contrary to public policy (Compl. ¶¶ 25-27); (2) the arbitrator refused to hear evidence pertinent and material to the controversy by which Plaintiff’s rights were prejudiced (*id.* ¶¶ 25-27); (3) the arbitrator was partial toward Respondents in the arbitration (*id.* ¶¶ 31-43); (4) the arbitrator would not allow Plaintiff to submit pretrial statements (*id.* ¶ 44); and (5) the arbitrator committed misconduct which prejudiced Plaintiff’s rights (*id.* ¶¶ 45-46).

Plaintiff subsequently filed an Amended Petition to Vacate the Arbitration Award [DE 15] which contains substantially similar claims regarding violations of the FAA. By Motion dated September 8, 2009 [DE 10], Defendants moved to (1) “remove” the action to New York State Supreme Court, Nassau County, and (2) extend Defendants’ time to answer the Petition in this action. By Order dated September 17, 2009, Judge Feuerstein referred Defendants’ Motion to me for a Report and Recommendation and my findings are set forth below.

II. DISCUSSION

With regard to Defendants’ application to extend to the time to file an Answer, during the September 22, 2009 Status Conference, I granted Defendants’ request and allowed Defendants until October 6, 2009 to answer, move or otherwise respond to the Complaint. *See* DE 12 (Sept. 22, 2009 Civil Conf. Minute Order).¹

As to Defendants’ application to remand this action to state court, the Court notes that although Defendants requested that the matter be “removed,” they intended to request that the matter be “remanded” from federal court to state court.² However, this Court does not have jurisdiction to remand the case based upon the manner in which it was filed. Plaintiff filed this action directly in Federal Court for the Eastern District of New York pursuant to the FAA. Because this case was not “removed” from state court, it cannot now be “remanded.” *See* 28 U.S.C. § 1447(c) (motion for remand to state court must be made within 30 days after the filing of the notice of removal from state court). I previously advised the parties of these circumstances

¹ A copy of the Civil Conference Minute Order [DE 12] summarizing the Status Conference held on September 22, 2009 is attached to this Order.

² I clarified this point with both parties during the September 22, 2009 Status Conference. *See* DE 12.

during the September 22, 2009 Status Conference. *See* DE 12 (attached hereto). Defendants then informed me that they wished to file a motion to dismiss and I set a briefing schedule for that motion. *See id.*

III. CONCLUSION

In light of the circumstances set forth above, I respectfully recommend to Judge Feuerstein that Defendants' Motion to Remand be denied.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report and Recommendation to file written objections. *See also* Fed. R. Civ. P. 6(a) and (e). Such objections shall be filed with the Clerk of the Court via ECF, **except in the case of a party proceeding *pro se*. *Pro Se* Plaintiff Henry Terry must file his objections in writing with the Clerk of the Court within the prescribed time period noted above. A courtesy copy of any objections filed is to be sent to the chambers of the Honorable Sandra J. Feuerstein, and to my chambers as well. Any requests for an extension of time for filing objections must be directed to Judge Feuerstein prior to the expiration of the (10) day period for filing objections. Failure to file objections will result in a waiver of those objections for purposes of appeal.** *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Beverly v. Walker*, 118 F.3d 900, 901 (2d Cir.), *cert. denied*, 522 U.S. 883 (1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Defendants' counsel is directed to serve a copy of this Report and Recommendation forthwith upon Plaintiff Pro Se by overnight mail and first class mail. Defendants' counsel is further directed to file proof of service upon ECF.

SO ORDERED.

Dated: Central Islip, New York
November 16, 2009

/s/ A. Kathleen Tomlinson
A. KATHLEEN TOMLINSON
U.S. Magistrate Judge

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

**CIVIL CONFERENCE
MINUTE ORDER**

BEFORE: A. KATHLEEN TOMLINSON
U.S. MAGISTRATE JUDGE

DATE: 9/22/09
TIME: 10:30 AM

Terry -v- Caravello et al., CV 09-3173 (SJF) (AKT)

TYPE OF CONFERENCE: **STATUS CONFERENCE BY TELEPHONE**

APPEARANCES: Plaintiff Henry R. Terry, PRO SE
Defendant Constantine C. Giannakos

THE FOLLOWING RULINGS WERE MADE:

1. The Court set today's conference based upon Judge Feuerstein's referral of the letter motion by Defendants' counsel seeing (1) an extension of time to file an Answer and (2) remand of this action to state court. After speaking with Plaintiff Pro Se and Defendants' counsel, I am GRANTING the extension of time for Defendants to answer or move with regard to the Complaint. Defendants will have until October 6 2009 to answer or move.
2. As to the motion to remand this action to state court, I advised Defendants' counsel that the Court does not have jurisdiction to "remand" the case based upon the manner in which it was filed. Plaintiff filed this action directly in Federal Court for the Eastern District of New York pursuant to the Federal Arbitration Act. The case was not "removed" from state court, and hence cannot be "remanded." Defendants may make a motion to dismiss and that is what they now have stated they wish to do. Therefore, while the parties were available, the Court set the following briefing schedule for Defendants' proposed motion to dismiss:
 - Defendants' motion papers and Memorandum of Law to be served no later than: October 6, 2009
 - Plaintiff's opposition papers to be served no later than: October 28, 2009
 - Defendants' reply papers, if any, to be served by: November 6, 2009.

Pursuant to Judge Feuerstein's "bundle rule," the motion is not to be filed on ECF until it is fully briefed. Defendants' counsel is directed to file all motion papers, including Plaintiff Pro Se's opposition on ECF on November 6, 2009.

Plaintiff Pro Se was directed by the Court today to either overnight or fax his opposition papers to Defendants' counsel in light of the deadlines assigned by the Court here.

3. Plaintiff indicated today that he may wish to make a motion to disqualify Defendants' counsel. That issue will be taken up after a decision is rendered on the anticipated motion to dismiss.
4. Defendants' counsel is directed to serve a copy of this Order upon Plaintiff Pro Se forthwith and to file proof of service on ECF.

SO ORDERED

/s/ A. Kathleen Tomlinson
A. KATHLEEN TOMLINSON
U.S. Magistrate Judge